

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4030-99
PLDarcy

date:

to: District Director, Manhattan
Examination Division
Attn: Mr. Lawrence Paduano

from: District Counsel, Manhattan

subject:

████████████████████
Tax years ended November █, █ and November █, █
Consents to Extend the Statute of Limitations
On Assessment

Uniform Issue List # 6229.02-00 and 6231.07-00

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This memorandum responds to your request for advice on how the Internal Revenue Service can enter into a valid agreement to extend the statute of limitations on assessment of tax items attributable to ████████████████████, a New York partnership subject to the uniform partnership audit procedures, I.R.C. § 6221 et. seq. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice.

ISSUES:

1. Who is the proper person or entity to enter into a consent to extend the statute of limitations on assessment, Internal Revenue Service Form 872-P, for the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] of [REDACTED] [REDACTED]?

2. Should the Internal Revenue Service execute the proposed Form 872-P submitted by [REDACTED].

CONCLUSION:

We conclude that [REDACTED] is currently the only person authorized to extend the statute of limitations on assessment of items attributable to the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] of [REDACTED] [REDACTED]. We recommend you not execute the Form 872-P currently proposed by [REDACTED]. [REDACTED] may designate a new tax matters partner or give another person the authority to execute a Form 872-P only by strictly complying with the relevant Treasury Regulations.

FACTS:

THE ADVICE IS RENDERED ON THE BASIS THAT ALL THE REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, WE MAY NEED TO MODIFY OUR ADVICE.

A. INTRODUCTION

The Examination Division is currently auditing the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] of [REDACTED] [REDACTED] (the "Partnership"), a New York partnership subject to the uniform partnership audit procedures. I.R.C. § 6221 et. seq. The parties seek to extend the statute of limitations on assessment for these periods. You have asked us for advice with respect to the Partnership's proposal to extend the statute of limitations on assessment of items attributable to the Partnership's taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED].

The statute of limitations on assessment for the taxable year November [REDACTED], [REDACTED] expires on [REDACTED]. The statute of limitations on assessment for the taxable year ended November [REDACTED], [REDACTED] expires on [REDACTED].

On [REDACTED], the Partnership became a public corporation through an initial public offering. According to the Examination Team, the Partnership's partnership agreement vested authority in an Executive Committee to make all decisions related to all the Partnership's business, including decisions related to tax matters.

B. The Tax Matters Partner Designations

On its Federal partnership income tax returns ("Forms 1065") for the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED], the Partnership designated [REDACTED], in her personal capacity, as the tax matters partner ("TMP"). [REDACTED] became a general partner of the Partnership during [REDACTED].

On [REDACTED] the Executive Committee of the Partnership appears to have passed the following resolution ostensibly designating a new TMP:

The Executive Committee designates [REDACTED] as the TMP with respect to the Internal Revenue Service examination of the United States Partnership Income Tax Returns of [REDACTED] for the fiscal years ended November [REDACTED], [REDACTED], November [REDACTED], [REDACTED], November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED]. [REDACTED] in her capacity of [REDACTED] will act on behalf of [REDACTED].

(hereinafter we refer to this document as the "Executive Committee Resolution"). The [REDACTED] was a general partner of the Partnership. On [REDACTED], the [REDACTED] merged into [REDACTED] and no longer exists as a viable entity. [REDACTED] executed the [REDACTED] Executive Committee Resolution on behalf of the Executive Committee. At the time, [REDACTED] was the Partnership's Executive Vice Chairman and the member of the Executive Committee who generally deals with tax matters. The Revenue Agents assigned to this case do not know whether the Executive Committee ever formally voted on this resolution. The

Partnership never filed the Executive Committee Resolution with any Internal Revenue Service service center.¹

On or about [REDACTED], the Partnership submitted a proposed Form 872-P to extend the statute of limitations on assessment of items attributable to the Partnership's taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] until [REDACTED]. This proposed Form 872-P lists as the TMP " [REDACTED], Successor in Interest to [REDACTED] by [REDACTED] ".² [REDACTED] was never a partner of the Partnership.

DISCUSSION:

1. THE PROPER PERSON TO EXECUTE INTERNAL REVENUE SERVICE FORMS 872-P ON BEHALF OF THE PARTNERSHIP

¹ On [REDACTED], the Partnership submitted the Executive Committee Resolution to the Examination Division attached to a proposed Form 872-P for the taxable year ended November [REDACTED], [REDACTED]. The [REDACTED] (by [REDACTED]) executed this proposed Form 872-P extending the statute of limitations on assessment to [REDACTED]. The Internal Revenue Service (per Ms. Shelia Caterraccio) countersigned this 872-P on August 10, [REDACTED]. However, prior to this, [REDACTED] executed, in her individual capacity as TMP, a Form 872-P extending the statute of limitations on assessment of items attributable to the Partnership's taxable year ended November [REDACTED], [REDACTED] until [REDACTED]. A representative of the [REDACTED] Revenue Service countersigned this 872-P. Since the Internal Revenue Service timely countersigned this valid Form 872-P, we need not comment on the validity of the subsequent 872-P executed by the [REDACTED] on [REDACTED]. For the purposes of this memorandum, we assume the statutes of limitations on assessment for the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] are currently open.

² The [REDACTED] is specifically designated as the TMP on the Partnership's Forms 1065 for subsequent periods. We do not now offer advice on who is the proper person to execute Forms 872-P for these subsequent periods. However, we do advise you that the successor of [REDACTED], [REDACTED] was never a partner of the Partnership and, therefore, is not a permissible TMP. See Treas. Reg. § 301.6231(a)(7)-1(b)(1).

The Partnership's Forms 1065 for the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] specifically designate [REDACTED] as the TMP. We believe that [REDACTED], in her individual capacity as TMP, is the only proper party to execute any Forms 872-P for these taxable years. I.R.C. § 6229(b)(1)(B). However, [REDACTED] does not want to execute future Forms 872-P and the Partnership has proposed that the [REDACTED], successor in interest to the [REDACTED], execute all future Forms 872-P. We advise you only to accept Forms 872-P executed by [REDACTED], individually as TMP, unless, and until, the Partnership properly designates a new TMP or gives another person the authority to execute a valid Form 872-P.

Pursuant to I.R.C. § 6229(b)(1)(B) the Internal Revenue Service can extend the statute of limitations with respect to the assessment of partnership items by entering into an agreement with the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement) before the expiration of such period. (Emphasis added). Treasury Regulation § 301.6229(b)-1(T) states that:

Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall:

- (a) Provide that it is an authorization for a person other than the TMP to extend the assessment period with respect to all partners,
- (b) Identify the partnership and the person being authorized by name, address, and taxpayer identification number,
- (c) Specify the partnership taxable year or years for which the authorization is effective, and
- (d) Be signed by all persons who were general partners at any time during the year or years for which the authorization is effective.³

³ Under New York law, any general partner acting within his or her scope of apparent authority can bind the Partnership. New York Partnership Law, § 20 (McKinney 1998). We found nothing in New York law concerning the authority of a partnership committee

We do not believe the Executive Committee Resolution complies with Treasury Regulation § 301.6229(b)-1(T). First, the Partnership never filed this document with the service center where it filed its Forms 1065. Second, this document does not specifically authorize the [REDACTED] to extend the assessment period with respect to all partners as required by Treasury Regulation § 301.6229(b)-1(T)(a). Third, the document does not identify the [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6229(b)-1(T)(b). Finally, the document is executed only by a representative of the Partnership's Executive Committee and not by "all persons who were general partners at any time during the year...for which the authorization is effective (emphasis added)" as required by Treasury Regulation § 301.6229(b)-1(T)(d).

If the Partnership wants to authorize a person besides [REDACTED] to extend the statute of limitations on assessment, the Partnership must strictly comply with Treasury Regulation § 301.6229(b)-1(T). Since the regulation specifically requires an authorization to "be signed by all persons who were general partners at any time during the year or years for which the authorization is effective (emphasis added)," we advise you not to accept any document purporting to be an I.R.C. § 6229 designation from the Executive Committee.

[REDACTED]'s designation as TMP for the taxable years at issue remains in effect until such time as she properly resigns as TMP pursuant to Treasury Regulation § 301.6231(a)(7)-1(i); the Partnership makes a valid designation of a new TMP pursuant to Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f)⁴; or the Partnership revokes [REDACTED]'s TMP designation pursuant to Treasury Regulation § 301.6231(a)(7)-1(j). Treas. Reg. §§ 301.6231(a)(7)-1(l)(1)(v)(A-C).

[REDACTED] never executed any document that the Internal Revenue Service could reasonably consider a resignation under

such as the Executive Committee in this case. However, the issue in this case is strictly a Federal tax law issue governed by the Internal Revenue Code and accompanying Treasury Regulations. Therefore, we currently see no reason to deeply explore New York law.

⁴ Treasury Regulation § 301.6231(a)(7)-1(f) does not apply to the facts of this case; therefore, we will not discuss this section.

Treasury Regulation § 301.6231(a)(7)-1(i) nor has [REDACTED] executed a document certifying the selection of a new TMP pursuant to Treasury Regulation § 301.6231(a)(7)-1(d). Accordingly, unless the Partnership designates a new TMP or revokes [REDACTED]'s TMP status, [REDACTED] remains the TMP of the Partnership.

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(a) a partnership may designate a partner as its TMP or revoke a current TMP's status only as provided for in Treasury Regulation § 301.6231(a)(7)-1. (Emphasis added). Pursuant to Treasury Regulation § 301.6231(a)(7)-1(e) a partnership may designate a TMP for a specific taxable year at any time after the filing of its Form 1065 for that taxable year by filing a statement with the service center with which the Form 1065 was filed. According to the Treasury Regulations, this statement shall:

- (1) Identify the partnership and the designated partner by name, address, and taxpayer identification number;
- (2) Specify the partnership taxable year to which the designation relates;
- (3) Declare that it is a designation of a TMP for the taxable years specified; and
- (4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year.

The Executive Committee Resolution purporting to designate a new TMP does not comply with Treasury Regulation § 301.6231(a)(7)-1(e) and, therefore, is not effective. First, the Partnership never filed the designation with the service center where it filed its Forms 1065. Second, the designation does not identify the [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6231(a)(7)-1(e)(1). Finally, the designation is executed only by a representative of the Partnership's Executive Committee and not by "persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year" as required by Treasury Regulation § 301.6231(a)(7)-1(e)(4).

Accordingly, we do not believe that the Partnership properly designated the [REDACTED] as TMP.⁵

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(b)(1) a Partnership⁶ may designate a person as TMP for a taxable year only if that person--

- (i) was a general partner in the partnership at some time during the taxable year for which the designation is made; or
- (ii) is a general partner in the partnership as of the time the designation is made.

The Partnership can designate such a person by following the procedures set forth in § 301.6231(a)(7)-1(e). The Partnership can also give another person the authority to execute Forms 872-P only by strictly complying with Treasury Regulation § 301.6229(b)-1(T).

We have concluded that [REDACTED] remains the TMP of the Partnership and that, currently, only she, in her personal capacity as TMP, has the authority to extend the statute of limitations on assessment of items attributable to the

⁵ Treasury Regulation § 301.6231(a)(7)-1(j) permits the Partnership to revoke [REDACTED]'s TMP designation by filing a statement of revocation with the service center. The content requirements of such a revocation essentially mirror those of Treasury Regulation § 301.6231(a)(7)-1(e) dealing with designating a TMP. Since the Partnership has not filed any document purporting to revoke [REDACTED]'s TMP status, we will not provide a detailed discussion on the revocation issue. However, we do conclude that the Executive Committee Resolution submitted by the Partnership does not constitute a revocation of [REDACTED]'s TMP status pursuant to Treasury Regulation § 301.6231(a)(7)-1(j).

⁶ [REDACTED] can also file a statement pursuant to Treasury Regulation § 301.6231(a)(7)-1(d) stating that the Partnership has designated a new TMP. However, Treasury Regulation § 301.6231(a)(7)-1(d)(3) requires that such a declaration state that the Partnership properly designated a new TMP. We assume that this still requires the Partnership to follow the designation procedures set forth in Treasury Regulation § 301.6231(a)(7)-1(e).

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Partnership's taxable years ended November [REDACTED], [REDACTED] and November [REDACTED]. [REDACTED] should execute the Forms 872-P for these periods as follows:

"[REDACTED], Tax Matters Partner of [REDACTED]"

We recommend that you not accept any Forms 872-P executed by anyone other than [REDACTED], in her personal capacity as TMP. If the Partnership wants to change its TMP or give authority to another to extend the statute of limitations, it may do so only by complying with the relevant Treasury Regulations. However, we request that you have District Counsel review any documents filed by the Partnership that purport to designate a new TMP or otherwise grant authority in another to execute Forms 872-P.

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We again remind you that this advice is subject to review by the National Office. As discussed on page one, we will contact you within two weeks of the date of this memorandum to discuss any comments the National Office may have regarding this advice. Should you have any questions regarding this matter, please contact Paul Schneiderman at (212) 264-1595, extension 290, or Paul Darcy at (212) 264-5473 extension 256.

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